No. 14,756

IN THE

United States Court of Appeals

For the Ninth Circuit

MARLIN FERRIS GOGGANS, also known as M. F. GOGGANS,

Appellant,

vs.

RETA OSBORN,

Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This appeal was taken by the appellant (defendant in the lower court) from an order entered by the District Court for the Territory of Alaska, Third Division, by Folta, District Judge, on the 15th day of March, 1955, holding the appellant, Marlin Ferris Goggans, to be in contempt of Court.

Jurisdiction of the District Court is based on 48 USCA 101 (53-1-1 ACLA 1949 and on 55-5-1 to 55-

5-16 ACLA 1949). Practice and procedure in the District Court is controlled by the Federal Rules of Civil Procedure.

Jurisdiction of this Court to review the judgment of the District Court is conferred by New Title 28 USC Sections 1291 and 1294 and is governed in procedural matters by the Federal Rules of Civil Procedure.

II.

STATEMENT AS TO PLEADINGS AND FACTS.

The District Court action was for divorce and was commenced on the 7th day of August, 1951. The complaint prayed for divorce, for temporary support for the plaintiff in the amount of $100.00 per week, that the property rights of the parties be determined by the Court and that the plaintiff be restored to her maiden name of Reta Osborn. (R 5.)

On August 10, 1951 the parties entered into a stipulation concerning support of the parties pending final settlement or adjudication of the divorce. (R 6.) The Court entered a restraining order pendente lite on the 10th day of August, 1951. (R 60.) Defendant filed an answer and cross-complaint. (R 8.) This answer, among other things, admits that the plaintiff, for a long time prior to the separation of the parties and to the commencement of the action, had been drawing $100.00 per week as household expenses but denies that plaintiff was entitled to that sum. (R 11.) The cross-complaint requested a divorce on the

grounds of incompatibility and cruelty and alleged that defendant desired the Court to make an equitable adjustment of the financial status of the parties and an equitable and final adjustment of the business affairs and property rights of the parties. (R 17.) Answer to the cross-complaint is found at R 17.

About the second day of October, 1951, plaintiff filed a motion to set the divorce cause for trial. She supported such motion with an affidavit dated October 2, 1951. (R 59.) Defendant filed answering affidavit. (R 18.) Plaintiff then filed an affidavit on October 10, 1951 (R 62), which discloses that subpoena duces tecum was issued out of the District Court directing the defendant to bring certain financial statements of the business theretofore operated by the parties at the time of examination of the defendant by deposition and that defendant appeared but failed and refused to bring the financial records as requested and that in his deposition defendant under oath admitted that he had used joint funds belonging to the parties to pay for his personal living expenses and housing in addition to the sum of $150.00 a week allowed by the restraining order and that defendant had expended certain other funds in violation of such order. This affidavit was not controverted by defendant.

The divorce case was tried on the 29th, 30th and 31st days of October, and the 1st day of November, 1951. (R 30.) Thereupon, the parties and their attorneys agreed upon a settlement of the rights of the parties and entered into an agreement denom-

tained therein were expressly set forth as a part of this decree." (R 34.)

Defendant complied with the decree until the month of August of 1952. At that time he voluntarily, under the terms of an agreement executed between W. P. Fuller & Co. and himself, turned over all of his property to W. P. Fuller & Co. The terms of the agreement with Fuller are not disclosed. (R 36.) In August 1952 defendant ceased making the payments required by the terms of the agreement and the decree. He has made no effort to comply with the decree since that time, except that on one occasion he paid $1,500.00 to avoid imprisonment for contempt. (R 41.)

On or about March 25, 1953, plaintiff filed a motion with the District Court to require the defendant to show cause as to why he should not be held in contempt of Court for not making the payments as ordered by the Court in the decree. In support of such motion plaintiff, on the 25th day of March, 1953, filed an affidavit. From such affidavit it appears that the failure of the defendant to make the payments required by the decree made it impossible for plaintiff to make the payments upon the mortgage which encumbered the family home and that the holder of the mortgage had threatened foreclosure unless the payments were made. (R 72.) In reply to that affidavit the defendant filed his affidavit dated April 4, 1953, in which he stated that he had voluntarily transferred his property to W. P. Fuller & Co. and claimed that he was without funds or financial resources to

make the payments required by the order of the Court. (R 36.) In reply to the defendant's affidavit above mentioned, the plaintiff filed an affidavit on the 7th day of April, 1953, to the effect that from the manner of living of the defendant he should be able to comply with the previous order of the Court. (R 37-38.)

On the 24th day of April of 1953, the District Judge entered his memorandum opinion and found that at the hearing the defendant manifested a lack of complete candor and that it appeared that the defendant's testimony was not credible in every respect but found that no substantial showing had been made that the defendant could make the payments required by the decree at that time and further found that it would serve no useful purpose at that time to commit him for contempt, but that such commitment in fact would defeat the just demands of the plaintiff for compliance with the terms of the decree. The Court continued the matter for a period of six months for further hearing and reserved the power to commit the defendant for contempt at that time if circumstances should warrant. (R 74.) The Court in that order specifically ordered the defendant to appear on August 7, 1953, to submit himself to further examination upon the issue raised by the motion for contempt. (R 74.)

On September 11, 1953, the plaintiff filed an affidavit which alleged that the defendant had been steadily employed since immediately following the hearing held in April and that he was receiving a monthly salary of approximately $573.00. (R 76.)

The matter was again heard on the 26th day of September, 1953, on the order to show cause. Both parties were present and testimony was taken. The Court found defendant guilty of contempt of court and sentenced him to imprisonment until the sum of $1,500.00 was paid. The order gave him a period of two days to make such payment or to surrender himself to the United States Marshal. (R 77.) Defendant paid the sum of $1,500.00 as ordered. (R 41.)

Defendant made no further payments. He was cited to appear before the District Court on November 5, 1954. At that hearing defendant argued that the Court had no power to cite him for contempt because, as he contended, the payments in question were the result of agreement and were not alimony. (R 39.) This contention had not been raised in previous proceedings. The Court found that defendant had not shown that he was not in position to make the payments required by the terms of the decree and by order entered November 12, 1954, directed the defendant to pay forthwith to the plaintiff the sum of $1,500.00, together with interest at the rate of 6% per annum on the unpaid portion of the home mortgage from the 1st day of January, 1954, and that the defendant should pay interest on the mortgage accruing thereafter. (R 40.)

The defendant refused to comply with the order of the Court. Thereupon he was again cited to show cause as to why he should not be held in contempt of court. In the affidavit supporting her request for order to show cause plaintiff alleged that she had

received numerous letters written by the holder of the mortgage against the home and that unless payments were made that foreclosure of the mortgage was imminent. (R 42.) This affidavit also stated that defendant was regularly employed at a salary in excess of $6,000.00 per year and that the defendant had refused to make the payments as ordered by the Court and had stated that he did not intend to make such payments. (R 42.)

Defendant answered the order to show cause with an affidavit filed March 8, 1955. (R 44.) This affidavit makes no denial of any of the matters set forth in plaintiff's affidavit. It alleges that defendant had been adjudicated a bankrupt on December 23, 1954, and that he had listed the indebtedness owing to the plaintiff in his schedules of debts and liabilities in the bankruptcy proceedings. It also alleged that defendant had no funds with which to pay the debt or any part thereof. (R 44.)

After hearing arguments on the matter the Court entered its order on March 15, 1955, finding that the defendant was in contempt of the Court and should be committed to the custody of the United States Marshal until he complied with the order of the Court made on November 12, 1954. Opinion of the Court is found at page 45 of the record and the order at page 46 thereof. Defendant filed objections and filed notice of appeal. (R 48, 49.)

For the information of this Court appellee states that defendant filed application for discharge in bankruptcy in the Bankruptcy Court. This application

was resisted by appellee. Under date of March 5, 1956, the Bankruptcy Court entered its order denying discharge of the defendant. No application for review of that order has been filed.

III.

QUESTION FOR DETERMINATION.

As appellee views this matter, the sole question for determination by this Court is as to whether the District Court for the Territory of Alaska, Third Judicial Division, did or did not have jurisdiction to deal with the defendant for contempt of that Court at the time of the entry of its order dated March 15, 1955.

IV.

SUMMARY OF ARGUMENT.

The parties to this action intended that their agreement of November 1, 1951, should be filed in the divorce case then pending between the parties. They intended that such agreement should be considered by the Court and that the agreement, at the discretion of the Court, by reference might be made a part of the final decree of divorce. The agreement was intended to settle all claims between the parties, including those arising out of the business theretofore conducted by the parties, and those arising out of the marriage relationship existing between the parties. The agreement was considered by the Court and was

adopted by the Court and by reference was made a part of the divorce decree. The decree specifically provided that each of the parties to the action should be bound by all of the provisions of the agreement to the same extent as though the agreement were set out in full in the decree. The defendant has been specifically refused a discharge in bankruptcy and cases involving discharges in bankruptcy have no application here. The defendant having failed and refused to comply with the orders of the Court is subject to being dealt with for contempt of Court. The payments to be made by the defendant were for the support and maintenance of the plaintiff whatever they may have been called. Defendant has breached his agreement but also in addition to breaching the terms of the agreement, he has specifically refused to comply with lawful orders of the Court. Contentions of the defendant that this proceeding is merely a proceeding to attempt to collect a debt by contempt proceedings are not justified by the record.

V.

ARGUMENT.

The parties to this action were husband and wife. During their marriage they acquired and operated a certain business. The value of this business is not shown by the record, but it appears as a matter of record that at the time of the commencement of this action, and for the preceding seven or eight months, the plaintiff had been drawing for her living and

household expenses the sum of $100 per week. The amount drawn by the defendant during this period is undisclosed but the parties stipulated at the commencement of the action that the defendant could draw $150.00 per week from the business and that plaintiff could continue to draw $100.00 per week. Accordingly, it appears that the value of the business was considerable.

During the course of the trial the parties agreed upon a settlement of their property and marital rights. The agreement provided that all of the business and the property belonging to the parties was transferred to the defendant, save and except a 1947 Pontiac automobile and the family home which were given to the defendant. The family home was encumbered by a mortgage to the extent of $13,000.00. The agreement made no provision for mortgage or other security for the payment of the moneys to be paid to plaintiff by the defendant, or for the payment of the moneys necessary to clear the mortgage against the family home. However, it is clear from the agreement that the intention was that the plaintiff would receive her home free and clear of encumbrances had the defendant lived up to his agreement. It is also clear from the agreement that the parties intended that the agreement should be considered by the Court in the pending divorce action, and that the Court at its discretion could adopt the agreement made by the parties as its order concerning the settlement of the rights of the parties. While the agreement is called a property settlement agreement, it was also a settlement of the marital rights of the parties.

The agreement was presented to the Court for its consideration and was adopted by the Court and, as intended by the parties, it was by reference made a part of the decree of the Court. The decree provided that each of the parties should be bound by all the terms and provisions of the agreement to the same extent as though the same were set out in full in the decree.

The plaintiff performed her part of the agreement and the defendant received all that was due to him by the agreement.

The defendant performed his part of the agreement for a period of about nine months. At that time he voluntarily disposed of all of his property and ceased to perform his part of the agreement as required by the decree. By his own actions he made it impossible for the plaintiff to enforce her rights by execution. Subsequently, defendant was adjudicated a voluntary bankrupt. His attitude in this matter has been to admit his liability under the decree of the Court but to refuse compliance with that decree and to dare the plaintiff and the Court to do something about his refusal. On at least two occasions he has been found guilty of contempt by the District Court because of his blatant refusal to obey the order of the Court. On another occasion he was inferentially found guilty of contempt but the Court refused to commit him because at that time it appeared the commitment would serve no useful purpose, and in fact would defeat "the just demands of plaintiff that the decree be complied with". Now he comes before this

Court and argues that because he has made it impossible by his own actions for the plaintiff to collect the amount due to her and because, as he claims, the amount due is a debt, and not money due for alimony, that he cannot be forced to comply with the orders of the Court by contempt process.

Appellee believes that on the record there is no question at all but that the District Court had jurisdiction and the power to deal with the defendant for contempt of that Court and that the order of the District Court holding defendant in contempt should be sustained.

In spite of the fact the findings of fact declare that the defendant is entitled to the divorce, there is no finding either expressly or by implication that plaintiff was at fault in the matter. If there is any doubt on the question of fault appellee calls the Court's attention to Title 56-5-13 ACLA 1949 § (7) which provides that in a divorce decree the Court shall have power

> "* * * to change the name of the wife when she is not the party in fault."

The Court in this case changed the name of the wife.

This case does not involve a situation where the parties entered into an agreement and divorce was thereafter taken by default, or where the defendant may have had any doubt at all concerning the decree entered or its effect. This action was contested and was actually tried over a period of four days. Thereupon, the parties agreed on a settlement of their vari-

ous rights, subject to the approval of the Court, presented their agreement to the Court for its approval and the agreement was approved and adopted by the Court, and the Court specifically ordered both parties to comply with the agreement to the same extent as though it were set out in full in the decree.

This is not a case in which the defendant has been discharged in bankruptcy. He requested discharge and the discharge was specifically refused. So far as this case is concerned the defendant stands as if the bankruptcy proceeding had not been commenced.

This is not a case, as alleged by the appellant in his brief, where the parties simply made a contract of purchase and sale and where the defendant purchased the interest of the plaintiff in a certain business. The parties intended that their agreement should be considered and confirmed by the Court and that the agreement should be made a part of the decree of the Court. The only possible conclusion is that the parties and the Court intended something by that procedure. Making the agreement a part of the decree was not effective for any purpose and accomplished nothing if one were to accept the argument of appellant. Appellee believes that it is apparent from the record that the particular purpose of the parties, and of the Court, in making the agreement a part of the decree, was that the Court might require enforcement of the agreement, as embodied in its decree, against either of the parties, by contempt proceedings if that should become necessary.

be distinguished on the law and on their facts from the situation in question on this appeal.

The *Ridenour* case, above cited, is a leading Washington case on this point and was cited by the other two Washington cases cited in appellant's brief. A reading of that case will disclose that the Court held that the decree did not sufficiently set forth or incorporate the agreement in question so that the decree could be the basis for a contempt action. Having so held, the Court then proceeded to state that an agreement of the parties could not be enforced by contempt proceedings unless it involved *alimony as such.* We believe that the latter statement was dicta, as will be disclosed by a reading of the case. In its decision, the Court used the following language:

> "In the case at bar the agreement to pay was not unconditional; nor was it incorporated in or made a part of the decree. The recital in the decree, that the agreement was made a part of it, was ineffectual, because at the time the decree was signed the agreement was not a part of the record."

It should be noted that the *Ridenour* case concerned a decree secured by default. The facts in the *Ridenour* case were so different from the facts of this case that the *Ridenour* case is worthless as an authority in this case.

In the *Lang* case, above cited, it was conceded that the agreement in question was an agreement in settlement of property rights, and that under the specific provisions of the Washington Code that a decree con-

cerning the property rights could not be made the basis for a contempt action for failure to comply with the decree. The *Ridenour* case was cited, without analysis, for the proposition that no contempt proceedings would lie except as to a decree involving alimony or support.

The *Foster* case, above cited, involves a state of facts in which no agreement is involved, but in which the Court specifically divided the property of the parties and retained jurisdiction to modify the decree by transferring particular property to the wife, or by requiring conveyance of property to the wife, and imposed specific liens forecloseable as a chattel mortgage upon all of the husband's property. That case, too, declared that under the authority of the *Ridenour* case, and under the particular provisions of the Washington Statute, enforcement of a decree settling property rights could not be enforced by contempt proceedings. The particular law in question was cited as being Remington's Revised Statutes, Sec. 988. (Appendix *1.) No such statute of the Territory of Alaska has been cited by appellant or found by appellee. On the contrary, the Alaska Statute (56—5-13 A.C.L.A. 1949 sub-paragraph 6, Appendix *2). It also appears that the wife in the *Foster* case had completely adequate remedies to enforce her rights without resort to contempt proceedings.

The case of *Commissioner of Internal Revenue v. Tuttle,* above cited, involved an agreement whereby the husband placed certain property in trust for the wife. The Commissioner of Internal Revenue claimed that

the proceeds of such trust were in fact alimony and should be included by the husband in his income tax return. The Court held that the proceeds in question did not constitute alimony and that, accordingly such proceeds were not taxable to the husband. Appellee believes that a mere reading of the case will demonstrate that it is no authority for the position taken by appellant in the current case.

Conceding, for the purpose of argument, that the Washington rule is to the effect that a decree involving a property settlement agreement cannot be enforced by contempt proceedings, appellee believes that such rule is not the law of Alaska and that in any case under the facts and circumstances disclosed by this record, that the District Court had full and complete jurisdiction and power to deal with the defendant for contempt of the Court. The word "alimony" by definition means money to be paid for support and maintenance of a party to a divorce or separate maintenance action. (See Black's Law Dictionary "alimony.")

Appellant in his brief alleges that plaintiff did not ask for alimony or maintenance or support money in her complaint. As a matter of fact, in paragraph IV of the complaint, plaintiff stated that she was entitled to the sum of $100.00 per week *for her living expenses* from the business belonging to the parties, and that such sum had been agreed upon by the parties. She had been drawing $100.00 a week for such purpose and the parties stipulated that plaintiff should continue to receive $100.00 a week until final adjudica-

tion of the action. That stipulation was confirmed by the order pendente lite. By the terms of the agreement settling the rights of the parties, as confirmed by the Court, plaintiff was to receive the sum of $250.00 per month for a period of four years, and was to receive a further sum of $250.00 per month to be used in clearing the mortgage which encumbered her home. Can it be said that either of these payments was not a reasonable sum to be paid toward the support and maintenance of the plaintiff, or that it was not in fact intended that such payments were to be for the support and maintenance of the plaintiff? We think not. We further believe that the fact that the agreement and the Court order did not denominate the payments as being alimony or support money is not controlling. We believe that the Court should and will look at the entire record and that it will be apparent that the intention of the parties and of the Court was that the money to be paid by defendant was to be paid for the support and maintenance of the plaintiff and for the purpose of giving her an unencumbered home where she might live. We think it further appears without dispute that by the actions of the defendant the plaintiff has been unable to make the mortgage payments and will eventually lose her home unless the defendant is required to make the payments to clear the mortgage.

Appellee calls the Court's attention to an extensive annotation in 154 A.L.R. beginning at page 443. This annotation is entitled "Provision in Divorce or Separation Decree Incorporating or Based Upon Agree-

ment for Alimony or Support as Enforceable by Contempt Proceedings." This annotation is exhaustive and sets forth the various propositions and contentions which have been advanced in contempt cases, including those advanced by the appellant in this case. Appellee further calls attention to various cases which she believes sustain the jurisdiction of the lower Court in this matter.

The case of *Tripp v. Superior Court* was decided by the District Court of Appeal of the State of California in 1923 and is found at 214 Pac. 252. The facts of that case are very similar to the facts here being considered. By settlement agreement, made prior to the commencement of an action for divorce, the husband agreed that he would convey certain property to his wife and that he would pay certain indebtedness against one parcel of such property. The agreement specifically provided that it should be made subject to the approval of the Court and the divorce decree adopted the agreement of the parties. The husband transferred the property in question but refused to pay the indebtedness against the property. He was cited for contempt and was found guilty of contempt because of his refusal to make the payments as agreed by the parties and as ordered in the decree. The contempt order provided that the defendant could purge himself from contempt by making a partial payment on the amount due on the indebtedness. On appeal the husband contended that the decree did not specifically order him to pay the amount of the indebtedness men-

tioned in the agreement. The Court conceded that neither the interlocutory decree or the final decree contained any specific order concerning the payment. In overruling the petitioner's contention, the Court, at page 253, used the following language:

> "The agreement recited the fact that a divorce action was pending between the parties, and contained a formal stipulation that it should be subject to the approval of the court and that, when so approved, it should be embodied in the decree, in the divorce action. This stipulation surely contemplated that the terms of the agreement, when it should be embodied in the decree, should have the compelling power of the court behind its every covenant. The court had full power to deal with the matters covered by the agreement and to render its judgment thereon, at least to the extent of making proper provisions for the support and maintenance of the wife, provided that it were first ascertained that petitioner was guilty of the charges made against him in the divorce action. Notwithstanding this power of the court, the parties undertook to stipulate a decree as to the property matters, subject, under the law as well as under the agreement, to the approval of the court. This approval was evidenced by the fact that the agreement was incorporated in terms in both the interlocutory and final decrees, preceded in each instance by the statement that the agreement was made part of the decree. Under these circumstances we are convinced that the terms of the agreement, except insofar as they were executed either before or at the time of the interlocutory decree, became enforceable as mandates of the court."

The language used is equally applicable to the present case.

The case of *Seymour v. Seymour* was decided by the District Court of Appeal of the State of California in the year 1937 and is found at 64 Pac. (2d) 168. The husband in that case, after executing a property settlement agreement, secured a divorce. The decree approveed th agreement of the parties. The husband refused to make the payments required by the agreement and by the decree. He was cited for contempt and then moved to modify the decree. It was argued, on appeal, that the Court was without jurisdiction to enter a decree requiring the husband to make payments of money after the entry of the decree under the contention that the divorce was granted to him and not to the wife. He also questioned the power of the Court to compel money payments by means of a contempt proceeding. The Court held that the divorce Court had jurisdiction to make the order in question and, accordingly, had the right to enforce its order by citation in contempt.

The case of *Lazar v. Superior Court* was decided by the Supreme Court of California in 1940 and is found at 107 Pac. (2d) at page 249. In that case the parties had agreed upon a settlement whereby the husband was to pay the wife $130.00 per month, during her lifetime, or until she should remarry and which provided that the provisions of the agreement were to be incorporated in any decree of divorce between the parties. The wife secured a divorce, the agreement was approved by the Court and made a part of the decree.

The decree by its terms specifically provided that the wife was not entitled to any maintenance, support or alimony. The husband failed to make the agreed payments and was cited for contempt. At the hearing on the contempt citation the Court ordered petitioner to pay certain moneys then in his possession to his former wife. The husband refused to obey. The Court adjudged him to be in contempt. He then took certiorari proceedings to review the contempt order. He argued before the Supreme Court that the divorce decree provided that the wife was not entitled to maintenance, support or alimony and that, therefore, the Court had no jurisdiction to order him to pay $130.00 per month nor any jurisdiction to hold him guilty of contempt of Court for his refusal to pay that amount. The Supreme Court affirmed the contempt order. It said that the question to be decided was whether the provisions in the decree for the payment of $130.00 per month to his former wife was merely part of an agreement between the parties under which only the usual contract remedies are available, or as to whether such provision is a part of the Court's decree and as such an order for payment of support, maintenance or alimony which may be enforced in contempt proceedings. The Court held that a husband and wife may contract with one another concerning matters of property and support. Such agreements are subject to close scrutiny by a Court in a subsequent divorce action and may be approved, modified or rejected by such Court in the exercise of the powers given to the Court. The Court further held that if the settlement agreement

is complete in itself and is merely referred to in a divorce decree, or approved by the Court, but not actually made a part of the decree, then the provisions of the agreement cannot be enforced by contempt proceedings. On the other hand, if by the language of the agreement itself, it is shown that the intent was to make the agreement a part of a future divorce decree, that if the agreement is actually incorporated in the decree, then such provisions become a part of the order of the Court and may be enforced as such. The Court then holds that an examination of the agreement in question and of the decree clearly shows that both the parties and the trial Court intended the monthly payments to be made a part of the divorce decree and that such monthly payments were intended to be made for the support of the wife and that the provision in the decree declaring that the plaintiff is not entitled to maintenance, support or alimony is reasonably to be construed to mean that the wife is not entitled to maintenance, support or alimony other than as theretofore agreed upon by the parties as approved and adopted by the Court. All of the observations of the Court in that case are equally applicable under the facts of this case.

The case of *Solomon v. Solomon* was decided by the Supreme Court of the State of Florida in 1941 and is found at 5 So. (2d) 265. In that case the husband and wife had entered into an agreement providing that the husband would pay taxes and insurance upon the home of the wife and that the husband would pay to the wife the sum of $300.00 per month. The divorce decree made no express payment of any stipulated sums

of money but provided "that the property settlement and agreement . . . is hereby approved and ratified in all respects and incorporated by reference into this decree and made a part thereof." The Court held that such provision was clearly sanctioned by the divorce Court in its decree and was incorporated therein by reference sufficiently so that the divorced husband was under order by the Court to make such payment, and, therefore, such provision of the divorce decree was enforceable by contempt proceedings, even though the divorce decree contained no specific order commanding the divorced husband to make the payment.

See also *Miller v. Superior Court* (California) 72 Pac. (2d) 868, *Sessions v. Sessions* (Minnesota) 226 N.W. 211, *Ex parte Weiler* (California) 289 Pac. 645, *Sullivan v. Superior Court* (California) 237 Pac. 782.

In this matter the defendant admittedly consented that the agreement should be made a part of the decree. For a period of three years after the entry of the decree he made no contention that violation of the decree could not be punished by contempt proceedings. In those respects this case resembles the case of *Dean v. Dean* decided by the Supreme Court of the State of Oregon in the year 1931 and found at 300 Pac. 1027, 86 A.L.R. 79. In that case the wife commenced an action for divorce. The husband was served with process. He appeared and stated in open Court that he did not desire to plead to the complaint or to appear further in the suit. Default was entered and decree rendered in favor of the wife. The decree referred to the agreement made between the parties in settlement of their property rights. The agreement in question was to

the effect that the husband would convey to the wife, free of all encumbrances, a certain dwelling house and would pay to her as alimony $200.00 per month. The Court decreed that each of the parties should perform the terms of the agreement. The husband made the required payments for a period of four years and then ceased to make the payments and moved to set aside and vacate all of the decree except that part granting a divorce to the plaintiff. The plaintiff in turn had the defendant cited for contempt of Court for his failure to make the payments. The defendant husband was convicted of contempt and an order was entered directing him to pay the moneys into Court or be imprisoned until compliance with the order. The husband appealed from this order. The Court held that the defendant was not entitled to modification by reason of the fact that he had consented to the entry of the decree in question and that he had acquiesced in the provisions of decree for a long period of time and that under a valid, executed contract entered into between plaintiff and defendant prior to the decree, the terms of which were incorporated in the decree, the plaintiff had released her rights and interest in defendant's property in consideration of which another property was conveyed to her and stated that if the husband's motion could be sustained that her right and title to the property would become questionable. The Court ruled that the defendant having obtained a release from the plaintiff of any claims upon her part of the property owned by him has obtained the fruits of his contract and of the decree and for that reason he is estopped to deny

the validity of either. As to the contempt proceeding the Court said that the only ground urged by the husband for reversal of the contempt order was that the unpaid sums are a mere debt for which the defendant cannot be imprisoned for failing to pay because such imprisonment would be in violation of the Oregon Constitution. The Court held that the only question raised on the appeal as to the contempt is the question of whether the Court had jurisdiction to enforce payment of the sums awarded by the decree by an order committing the defendant to prison for contempt of Court. The holding was that the decree was for alimony and does not constitute a debt within the meaning of that term in the constitutional restriction. The contempt order was affirmed.

Appellant in this matter has attacked the validity of the order of the District Court entered November 12, 1954, on the ground that Judge McCarrey, according to the contention of appellant, thought there was something defective in the original decree dated November 30, 1951, and that Judge McCarrey entered an order specifically directing the payment of money to remedy that defect. Appellant further argues that such order would have constituted a modification of the original decree and therefore could not have been effective. In that respect, appellee calls the attention of the Court to the case of *Tripp v. Tripp,* previously cited. In that case, as in this case, the Court ordered the defendant to pay a part only of the amount admittedly due. The Appellate Court found that that order was more favorable to the defendant than he deserved, and that he had no occasion to question the

order. It should be noted that Judge Dimond in this case had previously ordered defendant to pay a part of the amount admittedly due. Judge McCarrey followed the same procedure. It was obvious in both instances that under the circumstances an order requiring the defendant to pay the entire amount then due under the terms of the decree would be futile.

VI.

CONCLUSION.

In conclusion it appears to appellee that a reading of the record will disclose without any doubt that the appellant in this matter has had and now has nothing but contempt for the District Court for the Territory of Alaska and for its orders. He started out by violating the restraining order *pendente lite.* He followed that by refusing to obey a subpoena issued by the Court. He followed that by voluntarily disposing of all of his property and then refusing to make the payments as ordered by the Court. When cited for contempt he contended that he could not comply with the orders of the Court. When found guilty of contempt he promptly complied with the orders and made the necessary payment. He followed with a voluntary bankruptcy petition and claimed that adjudication in bankruptcy released him from his duty to comply with the Court order. Finally, after everything else had failed, he claimed that the Court was without jurisdiction to deal with him for contempt. Failing in that in the District Court he refused to comply with the order of such Court re-

quiring him to pay toward the satisfaction of the mortgage against plaintiff's home and took this appeal. Appellee thinks that it is reasonable to speculate that appellant has expended more in prosecuting this appeal than he would have been required to pay in complying with the order of the Court. Appellee also points out that appellant secured and filed a supersedeas bond in this matter. What security, if any, appellant furnished to the bondsman is not known to appellee. However, it is apparent that in the event that the order of the District Court is affirmed, that the moneys due on the mortgage to the date of the order of the lower Court can be paid.

Appellee believes that it has amply been demonstrated that the District Court had jurisdiction to deal with the defendant for contempt and prays that the order of the District Court may be affirmed by his Court.

Dated, Anchorage, Alaska,
March 20, 1956.

Respectfully submitted,
DAVIS, RENFREW & HUGHES,
By EDWARD V. DAVIS,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

*1

"* * * If, however, the court determines that either party, or both, is entitled to a divorce an interlocutory order must be ordered accordingly, declaring that the party in whose favor the court decides is entitled to a decree of divorce as hereinafter provided; which order shall also make all necessary provisions as to alimony, costs, care, custody, support and education of children and custody, management and division of property, which order as to the custody, management and division of property shall be final and conclusive upon the parties subject only to the right of appeal; but in no case shall such interlocutory order be considered or construed to have the effect of dissolving the marriage of the parties to the action, or of granting a divorce, until final judgment is entered: Provided, that the court shall, at all times, have the power to grant any and all restraining orders that may be necessary to protect the parties and secure justice. Appeals may be taken from such interlocutory order within ninety days after its entry. (L '21, p. 332, section 2. Cf. L '54, p. 406, section 7; Cd. '81, section 2006; L '91, page 43, section 4; 2 H.C. section 770)."

*2

"For the division between the parties of their joint property, or the separate property of each, in such manner as may be just, and without regard as to

which of the parties is the owner of such property; and to accomplish this end the judgment may require one of the parties to assign, deliver or convey any of his or her real or personal property to the other party; and the provisions of section 55-10-6 of the Compiled Laws of Alaska 1949 shall apply to any such judgment."